

Below is the response of the Susan B. Anthony List Candidate Fund (the "Fund"), to the letter from the FEC dated April 27, 2005, with respect to the Fund's "Amended 30 Day Post-General Report (10/14/04-11/22/04).

Issue

Your letter (1) notes that the Fund has made both independent expenditures and in-kind contributions with respect to certain candidates, (2) suggests that "[t]he coordination involved in making an in-kind contribution to a candidate may preclude [the Fund] from making an independent expenditure in support of the same candidate," and (3) requests amendment of independent expenditures to in-kind contributions or "additional clarifying information."

Your letter raises other issues that will be dealt with separately by the Fund. The present letter will clarify the relevant legal standards and demonstrate how the Fund has correctly reported its activity with respect to independent expenditures and in-kind contributions.

Law

The federal courts have recognized the threat posed by vague and overreaching efforts to classify political communications as "coordinated" expenditures subject to regulation as contributions, and therefore allow such regulation only in the presence of substantial coordination and prearrangement. The FEC promulgated new coordination regulations that took effect on February 3, 2003, 68 Fed. Reg. 421. The new regulations provide for a three-part test to determine whether a communication is coordinated. All of the three tests must be satisfied before the conclusion is justified that the communications reported as independent expenditures were indeed coordinated, and should be reported as in-kind contributions.

See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617-18 (1996); *NCPAC*, 470 U.S. at 498; *Iowa Right To Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999); *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490-91 (D. Vt. 2000); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999); *FEC v. Public Citizen*, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999); *Republican Party of Minn. v. Pauly*, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 518 U.S. 604 (1996).

The three parts of the test consider: (1) the source of payment; (2) a "content standard" regarding the subject matter of the communication; and (3) a "conduct standard" regarding interactions between the person paying for the communication and the candidate or political party committee. 11 CFR 109.21(a).

Source of Payment. A coordinated communication is paid for by someone other than a candidate, an authorized committee or a political party committee. 11 CFR 109.21(a)(1). Since the independent expenditures at issue herein were made by the Fund, the source of payment part of the test is satisfied.

Content Standard. The purpose of the four content standards is to determine whether the subject matter of a communication is reasonably related to an election. A communication that meets any of these four standards meets the content requirement: (1) a communication that is an "electioneering communication"; (2) a communication that republishes, disseminates or distributes candidate campaign materials, unless the activity meets one of the exceptions at 11 CFR 109.23(b); (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or (4) a public communication that refers to a clearly-identified candidate, is publicly disseminated within 120 days before a primary or general election, and is directed to voters in the jurisdiction of the clearly identified candidate. 11 CFR 109.21(c)(1)-(4).

Since independent expenditures by definition expressly advocate the election or defeat of a clearly identified

ETEXT ATTACHMENT

candidate, the content standard is satisfied.

Conduct Standard. Under the final rules, only if at least one of the conduct standards is met, as well as the first two parts of the test, may the communication be considered coordinated. 11 CFR 109.21(d). The conduct standards are: (1) the public communication is made at the request or suggestion of the clearly identified candidate; (2) the candidate or candidate committee was materially involved in the decisions regarding the content of the communication, the intended audience, the means or mode of communication, the specific media outlet used, the timing or frequency of the communication, or size or prominence of a printed communication, or duration of a communication by broadcast, cable or satellite; (3) the communication is created, produced or distributed after one or more substantial discussions between the person paying for the communication and the candidate clearly identified in the communication. A discussion is considered "substantial" only if information about the plans, projects, activities or needs of the candidate that is material to the creation, production or distribution of the communication is conveyed to the person paying for the communication; (4) the employment of a common vendor, that is, a commercial vendor that had a previous or current relationship with the candidate and uses or conveys information about the candidate's campaign plans, projects, activities or needs of the candidate; (5) employment by the committee of a former employee/independent contractor of the candidate; and (6) dissemination, distribution or republication of the candidate's campaign material, beyond that permitted by 11 CFR 109.23(b). 11 CFR 109.21(d)(1)-(6).

The conduct standard has not been met.

Facts

The Fund identifies and endorses viable, pro-life candidates (especially women), then solicits contributions for the candidates from Fund members and bundles and delivers the contributions to the candidates. This is typical of how a number of similar organizations operate, e.g., EMILY's List (see <www.emilyslist.org>, endorsing and raising contributions for candidates that favor abortion rights) and The Wish List (see <www.thewishlist.org> endorsing and raising contributions for Republican candidates favoring abortion rights).

To identify candidates as strongly pro-life, Fund staff members research likely candidates. Then a representative of the Fund interviews likely candidates in person or by telephone and requests a packet of campaign material (e.g., position papers).

Candidates found to be both viable and ideologically compatible are endorsed. After the initial interview, there is little or no further personal contact between the Fund and endorsed candidates. Candidates are requested to add the Fund to their mailing lists to receive press releases and campaign update reports, and the Fund sends collected contributions to the campaigns.

The Fund spends money to print and mail solicitations to its members for contributions to endorsed candidates. These expenditures are listed on Schedule B forms attached to FEC reports as in-kind contributions to the candidates. As noted in your letters, such in-kind contributions were made to the candidates you list: George Nethercutt, Jim DeMint, and Mel Martinez. The reports filed also indicate that monetary contributions were made to these and other candidates, which were funds received from members as a result of these solicitations for the Fund.

In addition to these in-kind contributions, the Fund also made independent expenditures for activities as listed on the report pages you have attached to your letters indicating that such independent expenditures on behalf of the same candidates for whom in-kind contributions were made.

These expenditures were not made at the request or suggestion of the candidates; there was no material involvement of the candidates; there was no substantial discussion of these expenditures with the candidates; the Fund did not employ common vendors, former candidate employees or independent contractors; and the independent expenditures did not disseminate, distribute or republish any candidate's campaign material beyond what is permitted in 11 CFR 109.23(b)(4).

ETEXT ATTACHMENT

They were listed as independent expenditures in the reports because they were not coordinated with the candidates in any way under the standards of coordination set out in the Law section above, as more fully explained in the following Application section.

Application

As noted above, the United States Supreme Court in Colorado Republican held that coordination may not be presumed. It must be actual. Therefore, the mere fact that in-kind contributions were made does not foreclose independent expenditures, as you acknowledge in your letters by requesting the present explanation. See FEC Advisory Opinion 1996-1.

For an independent expenditure to be considered coordinated, one or more of the six conduct standards must be met. In this case, none of the conduct standards has been met.

Applying the facts to the law indicates that there is no coordination in this case because at the initial and only meeting with candidates as described above, none of the criteria for coordination were met:

- No candidates requested or suggested that the independent expenditure communications be made;
- No candidates had material involvement in the independent expenditure communications;
- No candidate had any substantial discussion with the Fund about the plans, projects, activities or needs of the candidate;
- No previous or present common vendors of the candidates were used;
- No former employees or independent contractors of the candidates were used; and
- None of the independent expenditures disseminated, distributed or republished candidate campaign material.

Conclusion

Since none of the conduct standards were met, there was no coordination and the independent expenditures were appropriately reported.